specifically. The 1996 Act is premised on the finding that rules which may be valid to address lack of competition today will no longer necessarily be justified as competition develops. It thus contains numerous "sunset" provisions that ensure that regulations remain in place only so long as they are needed. See Section 272(f).

Safeguards for LEC provision of facilities-based CMRS are also a "transition" mechanism, to await the development of broader competition in telecommunications markets. They are defined, and thus limited, by the need that they would address -- to prevent or detect improper use of market power. The premise on which the safeguards are based will disappear over time. So should the rules.

The Commission recently adopted a five-year sunset for the CMRS resale rule, which was drawn from the five-year period that PCS carriers have to build out their systems.[22] That is, however, a deadline for construction, not the date when the Commission expects PCS service to begin. PCS carriers will of course not wait five years to offer service, and cellular carriers, which already face PCS and SMR competition in many markets, will face multiple additional competitors long before five years out. Moreover, Section 271 and 272 of the 1996 Act contain shorter sunset provisions which will terminate requirements on the BOCs' offering of interLATA telecommunications and certain other services. The structural separation requirement for manufacturing sunsets in four years, and the

---

[22]CMRS Resale Order, supra n.6, at ¶ 24.

requirement for interLATA telecommunications services in a state expires three years after a BOC meet the statutory "checklist" for local competition in that state.

The premise for LEC-CMRS safeguards will disappear at the point the competitive checklist is met, because the Commission will then have found that effective local exchange competition exists. Any CMRS-related safeguards should terminate at that time. Alternatively, the Commission should set a specific date that would apply to all LECs with affiliates operating CMRS systems. Sunsetting any safeguards three years after they are promulgated will keep them in place until the year 2000, long past the date when PCS and other broadband carriers will be offering substantial competition to cellular operators, and past the date when other Commission regulations, designed to promote both landline and CMRS competition, will have been in force.[23] A three-year outside date for the sunset is thus consonant with the Commission's own actions.

VI. NO RULES GOVERNING JOINT MARKETING AND SALE OF CMRS SHOULD BE IMPOSED.

The Notice (at ¶¶ 60-68) also proposes to adopt rules for the joint marketing and sale of LEC and CMRS services to "implement" Section 601(d) of the 1996 Act. This is regulatory overkill which is not warranted either by the standard of "least

---

[23]For example, permanent landline number portability will be required in markets beginning in 1997, and all CMRS providers must offer number portability by mid-1999, less than three years away. Telephone Number Portability, First Report and Order, CC Docket No. 95-116, FCC 96-286, released July 2, 1996.

restrictive means" or by the 1996 Act. Existing competitive safeguards are adequate. There is no lawful basis to impose additional restrictions or separate affiliate requirements on cooperative efforts of LECs and their facilities-based CMRS affiliates, or on a LEC's decision to resell CMRS itself.

A. Section 601(d) Does Not Call for Implementing Rules.

The Notice fails to provide any cogent statutory basis for the Commission to rewrite what Congress has already done. It correctly notes (at ¶ 63) that "the language and statutory history of Section 601(d) of the 1996 Act indicate that the provision is self-executing and thus Section 22.903(e) is now a nullity." The Notice should have stopped there. It goes on, however, to assert a sort of free-roaming charter to "determine the scope of this statutory provision." (Id.) This statement, aside from being inconsistent with the finding that the statute is self-executing, is unsupported. The Notice also fails to explain why the Commission should exercise this alleged authority.

The plain fact is that Congress explicitly repealed the provisions on BOC-CMRS joint marketing and sales formerly in Section 22.903. The only legislative history on Section 601(d) clearly shows that it was intended to enable the BOCs to offer one-stop shopping for CMRS and other services, as their competitors have long been able to do. (Notice at n. 163.)

The Notice (at ¶ 64) goes off the track by relying again on the purportedly unlimited grant of authority in Section 272(f). It asserts that joint marketing

rules can be based on Section 272(f)(3)'s grant of authority to impose "public interest" safeguards. Again, however, Section 272(f)(3) does not apply to the BOCs' provision of CMRS, but only to services subject to the Section 272(b) structural separation requirements -- services that expressly exclude CMRS. The Notice then proposes a rule relying on Section 272(b)(5)'s requirement that "all transactions be reduced to writing and made available for public inspection." Section 272(b)(5), however, only applies to services subject to Section 272(b), which does not apply to CMRS. The Commission cannot lawfully "bootstrap" Section 272(f)(3) or 272(b)(5), which do not apply to CMRS, into a rationale for imposing LEC-CMRS joint marketing restrictions.

B. The Proposed Joint Marketing and Sale Rules Are Not Needed And Would Create New Anticompetitive Risks.

Section 601(d) evidences Congress' goal of removing the impediments to one-stop shopping for customers, based on the public interest and competitive benefits of purchasing multiple services from one vendor or at one location. Recent studies show that the vast majority of customers want a single provider for all their telecommunications needs.[24] One-stop shopping will allow the convenience of a single bill, as single contact for customer services, and cost savings through packaging of services. The Commission has recognized the efficiencies of one-stop

[24]Letter from Patricia E. Koch, Bell Atlantic Network Services, Inc., to William E. Caton, December 7, 1995 (filed as ex parte communication in GEN Docket No. 90-314).

shopping and used those benefits to justify unrestricted joint marketing of the nation's largest IXC and largest CMRS provider, AT&T.[25] As the Commission is aware, AT&T, Sprint, MCI and others have been aggressively marketing one-stop shopping.

Restraints on BOCs' or LECs' ability to offer these same efficiencies to their customers would distort the market by advantaging other competitors, and would deprive consumers of the benefits of one-stop shopping, without justification. Competitive safeguards alone ensure that there are identifiable transactions between a LEC and its CMRS affiliate or within a LEC's own business, that costs are appropriately allocated, and that the Commission can monitor those transactions. Further rules governing marketing and sale would be superfluous and harmful. The Notice offers numerous possible rules to govern joint marketing and sale. None should be adopted.

-- There should be no restrictions on a LEC's resale of CMRS, nor should a LEC be required to set up a separate affiliate for this purpose (¶ 67). A LEC that purchases CMRS for resale already must comply with accounting safeguards that both prevent and police cross-subsidies. It has by definition no market power in the resale of CMRS, so there is no conceivable risk that it may distort CMRS competition. There is also no reason to assume that the LEC will purchase its own affiliate's CMRS. If it can obtain service at lower rates from another facilities-based provider, it will have every incentive to do so. New restrictions on

---

[25]Craig O. McCaw, 9 FCC Rcd 5836 (1994).

a LEC's ability to resell mobile service, or additional separate subsidiary rules, would serve no purpose which could justify the burdens that they would create.[26]

-- The Notice (id.) asks whether volume discounts offered by CMRS providers to LECs should be restricted. There is no need for such regulation. Part 32/64 allocation rules are already in place to govern affiliate transactions. The Commission has, moreover, repeatedly allowed volume discounts, subject to the requirement that they be non-discriminatory,[27] and has just enacted a new, CMRS-wide rule that affirms a CMRS provider's obligation to offer all resellers service on non-discriminatory terms and conditions.[28] A competitor is today able to challenge any volume discounts through existing enforcement remedies. A new rule would not add to those remedies.

-- The Notice (id.) also asks "whether we should mandate public disclosure of terms and conditions of service" where resale is involved. Clearly not. The Commission has repeatedly found that mandatory disclosure of prices discourages vigorous price competition, removes carriers' ability to make rapid, efficient responses to market conditions, and risks collusion, price-signaling and other

---

[26]In various pleadings incorporated into this docket, BellSouth has amply demonstrated that the possibilities of improper cross-subsidy, assuming that they exist when a LEC operates its own CMRS network, do not exist when the LEC purchases an affiliate's capacity for resale. Nothing in the record undermines BellSouth's showing.

[27]E.g., Proposed Changes to the Commission's Resale Policy, 6 FCC Rcd 1719 (1991), aff'd, Cellnet Communications, Inc. v. FCC, No. 91-1251 (D.C. Cir. 1992).

[28]CMRS Resale Order, supra n. 6.

anticompetitive conduct.[29] Price disclosure rules here could not be squared with the Commission's findings in those other proceedings.

-- The Notice (at ¶ 68) tentatively concludes that no additional rules are needed to govern the costs of joint billing and collection, installation, maintenance and repair. This is correct. The Commission's existing accounting, billing and collection rules are adequate to ensure that costs of such operations are properly allocated. There is no basis for special rules governing provision of CMRS.

VII. CONCLUSION

Bell Atlantic and NYNEX urge the Commission to transform its approach to regulating LEC provision of CMRS by applying the legal standards Congress has set. It should first discard Section 22.903 now, because that rule cannot meet those standards. If the Commission finds that safeguards are needed, it should apply a separate affiliate rule for a transitional period to all incumbent LECs providing facilities-based broadband CMRS in overlapping service areas. It should not, however, adopt additional new safeguards, joint marketing restrictions, or

[29] E.g., Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1478 (1994); Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, FCC 96-123, released March 25, 1996, at ¶¶ 29-35.

requirements for LEC resale of CMRS. This balanced approach of an industry-wide safeguard, tailored to address specific problems, for a temporary period, would achieve the Commission's goals and be faithful to Congress's mandate.

Respectfully submitted,

BELL ATLANTIC CORPORATION
AND NYNEX CORPORATION

By: 

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Of Counsel:

Edward D. Young III
James G. Pachulski
Bell Atlantic Corporation
1320 N. Courthouse Road, 8th Floor
Arlington, VA 22101

Robert A. Lewis
NYNEX Corporation
1111 Westchester Avenue
White Plains, NY 10604

Dated: October 3, 1996